IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 28254

E. I. duPONT deNEMOURS & COMPANY, INC.,
Plaintiff-Appellee

vs.

ROLFE CHRISTOPHER AND GARY CHRISTOPHER,
Defendants-Appellants

Appeal from the United States District Court for
the Eastern District of Texas

APPELLANTS' PETITION FOR REHEARING

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SUGGESTION PURSUANT TO RULE 35(b) FOR REHEARING IN BANC

Defendant would respectfully show that your opinion of July 20, 1970, struck a serious blow at a citizen's right to use the public air space as well as a blow at the small business of photography.

In a case of first impression, and a decision which will be construed broadly against the rights of individuals, it is suggested that its importance for the future uniformity of the law justifies and indeed requires a consideration by rehearing in banc.

ERROR

Defendant respectfully submits that this Honorable Court committed prejudicial error in holding that "aerial photography" was "improper means".

ARGUMENT AND BRIEF

The Court erred in viewing this case (as did duPont) in a two-dimension world. Suppose that duPont in camouflaging the premises from the ground observation (as it indicated that it did in this instance) had camouflaged three sides of its plant, but neglected to camouflage the fourth. Would the Court say that an observer passing the fourth side on a public highway could not photograph and observe the construction activities? I doubt this Court of Appeals would so hold or any court would so hold. However, by injecting the third dimension of space, your Court now describes this as "devious", "unanticipated", and "piracy".

This is an unrealistic view of the modern world. Certainly this concept was true prior to the invention of the airplane, but at that time, a man's property extended from the center of the earth to the outer reaches of space. The Supreme Court of the United States, in today's world, has rejected this concept. There is a third dimension of space and a citizen is entitled to use it and make his observations, just as the Court would permit Christopher to drive down the public highway observing the industrial complex in question.

The Court overlooks comment (a) to Section 757, Restatement of Torts, which reads:

> "The suggestion that one has a right to exclude others from the use of his trade secret because he has a right of property in the idea has been frequently advanced and rejected. The theory that has prevailed is that the protection is afforded only by a general duty of good faith and that the liability rests upon breach of this duty; that is, breach of contract, abuse of confidence or impropriety in the method of ascertaining the secret. Apart from breach of contract, abuse of confidence or impropriety in the means of procurement, trade secrets may be copied as freely as devices or processes which are not secret. One who discovers another's trade secret properly, as, for example, by inspection or analysis of the commercial product embodying the secret, or by independent invention, or by gift or purchase from the owner, is free to disclose it or use it in his own business without liability to the owner."

Rather than basing its decision upon the use of the third dimension of space, the Court permits its decision to turn upon whether duPont

took measures to protect itself from observation. Obviously duPont was living in a two-dimension world when it disguised its plant from the ground but took no measures to camouflage from the air. The Court pays lip service to "reasonable efforts to protect from secrecy", yet disregards the undisputed evidence that duPont made no effort to protect itself from aerial observation. They could not plead this was "unanticipated" as the record shows the very same pilot flew an aerial photographer over the same premises a week or two weeks before this occurrence (page 195 - 196).

You do not make a citizen a "peeping Tom" by undressing in front of a lighted picture window. We respectfully submit that duPont (a company which has been involved with science since the times of the Revolution) does not make Christopher a pirate by leaving its premises open to observation from the dimension of space. Its concept of a two-dimensional world should not be preserved by this Court in an opinion to be followed by citizens (and even nations) in the future.

Analytically the Court is concerned about the right of privacy and has ingrafted a cause of action for a breach of a right of privacy to the Texas law. This it formerly refused to do in McCullagh vs. Houston Chronicle Publishing Co., 211 F. 2d 4 (5th Cir., 1954).

Throughout the United States it is uniformally conceded that corporations do not have a cause of action for right of privacy; specifically, in Texas even an individual does not have a cause of action for breach of right of privacy.

The Court has allowed its indignation toward an aerial observer (over a neighbor's fence, so to speak) to obscure its duty to uphold the right of the individual to observe what is visible and to use the "public ways" for the exercise of this freedom. Photography is merely adjunct in that it preserves the human eye's impression. Those with "secrets" have no monopoly per se. The Court's opinion of July 20 is more restrictive than any case heretofore rendered throughout the United States on this question. It would limit the right of discovery of secrets to "reverse engineering" or "voluntary disclosure". Assuming that the photographs are to be used by a third party, quite obviously "reverse engineering" (which is approved by the Court) is involved. The true question, rather, is how was the product or process obtained, which is to be "reverse engineered".

The Court is concerned with the morality of the invasion of privacy by observation. What we have is analogous to being next to a neighbor with a high fence. The Court says it is improper to build a large step-ladder whereby you can look over the fence onto your

neighbor's property. Nevertheless, the Texas law holds that such invasion of privacy is not actionable. Milner vs. Red River Valley Pub. Co., 249 S. W. 2d 227 (Dallas, 1952).

The Court, while perhaps conceding the right to make observations from public highways, bridges and similar locations, as well as photography to record such observation, strikes its blow against aerial photography in similar public pathways. It says that it is unreasonable to ask duPont to guard against such "unanticipated, . .undetectable, or . . unpreventable" means. Camouflage has been in existence for at least fifty years and involves no unreasonable expense or effort. DuPont concedes that it took such measures against ground observation but here is rewarded, not for effort, but rather for its own failure to think ahead. No "roof" is required; merely inexpensive netting or scraps of cloth defeat the aerial observer, just as fences defeat the ground observer. We submit that the "means" should be judged improper in and of themselves. The question should not turn upon duPont's own inaction.

A consequence of the Court's opinion is that the traveler in the public air space must close his eyes for fear of damage suits and injunctions in the event that someone below is constructing what they term a "secret". The burden is shifted to the user of the public

space, away from the corporate giant which best knows what it desires to protect. How does the Court draw a distinction between observation from the ground and observation from the air, if it does draw such in this case? Heretofore the courts have been unanimous that observation of the product or process, so long as such was not obtained through fraud, misrepresentation, breach of confidence, trespass, wire tapping, theft, or similar means, was permitted. Now observation, certainly observation from the air, is found to be illegal and actionable.

We submit this restriction on the use of photography and the use of the air ways is not validly distinguishable from observations of products and processes made on the ground. Therefore, we submit that the correct ruling of the Court should be that observations (whether preserved by photography or not) are legal so long as the use of the air ways themselves are legal. We submit that it is the right of each citizen to use the air ways or other public pathways to make observations, whether of secrets or not. That if secret, the burden should be upon the industrial corporate structure to use such means as are readily available to preserve that which they desire to keep secret. That under the Texas law, you have the right to build a larger step-ladder into the public air space and observe to your heart's content that which the owner has left in open view and has made no effort to

conceal.

WHEREFORE, defendant prays the Court permit a hearing in banc of this petition for rehearing, and that upon hearing this petition for rehearing be granted and the decision of the Trial Court be reversed.

Respectfully submitted,

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By David J. Kreager
Of Counsel

CERTIFICATE OF SERVICE

Two copies of the foregoing Petition for Rehearing and Brief In Support Thereof were served upon Mr. Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas 77701, attorneys for Plaintiff-Appellee, duPont, by mailing copies to said address on the 31st day of July, 1970.

David J. Kreager